IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1352

SARAH D. BOLLOTIN,

Petitioner,

v.

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI and "BOE" BOTNICK and "MOE" KALLENECK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, EXCEPT DOE, BOE AND MOE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This Brief is respectfully submitted in behalf of respondents Kaufman, Taylor, Kimmel & Miller, Stanley L. Kaufman, Allan K. Peckel, Richard M. Rosenberg and

Ruth Lewinson.

The complaint was filed on November 28, 1979 in the United States District Court for the Southern District of New York. The complaint alleged that petitioner made a tax claim on her income tax return for 1970 which was disallowed, and she then filed an action (District Court for the Southern District of New York, 75 Civ. 1282 Pro Se). The action was subsequently assigned to Judge Dudley B. Bonsal of that Court.

The complaint alleged that at a pretrial conference Judge Bonsal appointed Stanley L. Kaufman, Esq. as her attorney; that petitioner attended a conference in Mr. Kaufman's office on November 24, 1975 at which time she presented the facts and requested that she be kept fully informed of all proceedings, and that to the contrary, Mr. Kaufman appeared in the United States District Court on December 8, 1975

without her knowledge and subsequently lost her case.[1/]

The complaint further alleged that petitioner filed an appeal (Docket 76-6187), made a fruitless effort to take the case to the United States Supreme Court[2/] and as a result petitioner was held up to scorn, hatred, ridicule and contempt and was evicted from her apartment causing her great hardship, humiliation, physical injury and illness and damages in the sum of $1,000,000.

The complaint named three additional defendants, Doe I-VI, "Boe" Botnick and "Moe" Kalleneck, alleged to be United States District Court clerks who handled official court papers on the 18th floor of the Courthouse. The complaint alleged that petitioner decided to sue counsel for

1/ The record showed that petitioner attended and testified on her own behalf on the trial.

2/ After the affirmance by the Second Circuit of Judge Bonsal's opinion and order on petitioner's pro se appeal.

malpractice, but was thwarted, obstructed and delayed by said clerks.

In the earlier case which was tried before Judge Bonsal, petitioner made a claim for a tax refund of $1,058 plus interest against the Internal Revenue Service as a result of the disallowance of a retirement income credit on her 1970 income tax return. In a painstaking review of her claim, Judge Bonsal, in his opinion and order dated July 30, 1976 reviewed the facts and law concerning such claim and held in favor of the Internal Revenue Service. It appeared from the opinion that petitioner's case was decided substantially on the basis of documentary evidence and hinged on petitioner's failure to execute requisite forms in order to qualify for the tax credit claimed as required by the Internal Revenue Code. In a footnote to the opinion Judge Bonsal expressed the appreciation of the Court for the able services

rendered by Stanley L. Kaufman, Esq.

More than three years after the opinion and order was rendered in the District Court, petitioner turned on her counsel and the clerks of the Second Circuit by filing this action. After service of the answer which denied the allegations of malpractice and alleged the action was barred on jurisdictional and limitation grounds, the respondents (except Doe, Boe and Moe) moved to dismiss the complaint under F.R.Civ.P. Rule 12(h)(3) upon the grounds that there was a lack of jurisdiction over the subject matter and under F.R.Civ.P. Rule 56(e) upon the ground that the complaint failed to state a claim upon which relief can be granted for the reason that the applicable state statute of limitations had expired before the commencement of the action.

The motion of said respondents in the District Court came on regularly to be

heard before Judge Gerard L. Goettel. Judge Goettel rendered an opinion and order on May 12, 1980 (Petitioner's Appendix, 1a-11a) which dismissed petitioner's complaint upon the grounds that the District Court did not have jurisdiction of the subject matter of the action and that it was time-barred. The Second Circuit in an opinion and order dated October 29, 1980 (Petitioner's Appendix, 12a-15a) affirmed on the same grounds.

REASONS FOR DENYING THE WRIT

POINT I

THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER PETITIONER'S MALPRACTICE CLAIM AGAINST RESPONDENTS

Petitioner in her complaint sought to create federal jurisdiction on the basis of a common law malpractice claim against respondents in the absence of diversity jurisdiction. None of the compelling reasons for the grant of a writ of certiorari set forth in Rule 17 of the Rules of this Court

is present.

The District Court properly held that the criminal statutes cited in petitioner's complaint did not provide a jurisdictional basis for a civil action, nor did a broad-brush claim that any denial of legal rights amounts to a civil rights violation under the statutes cited or the United States Constitution. The opinion noted that petitioner specifically eschewed any claim of diversity jurisdiction and that it was clear that such did not exist.

The District Court's opinion was likewise proper in denying jurisdiction under 28 U.S.C. § 1331 upon the ground that despite petitioner's demand for $1,000,000 in damages, it was abundantly evident that the damages for the alleged attorney's malpractice were, at most, in the vicinity of $1,000 and consequently the necessary $10,000 at issue under 28 U.S.C. § 1331 was

lacking. The District Court's opinion was further correct in holding that pendent jurisdiction did not exist because the earlier case had long since been disposed of and there was nothing for the instant claim to be pendent to since until the earlier action was completed the instant action for malpractice did not exist.

Finally, the District Court correctly held that the instant action was not truly ancillary to the earlier proceeding for the reason that the instant action was not necessary in order to give effect to the relief on the earlier federal claim and indeed the instant complaint actually challenged the earlier decision.

In affirming, the Second Circuit properly held that petitioner's malpractice action failed to raise a federal question, and that the jurisdictional argument by petitioner that the malpractice

claim was ancillary to the original claim for a tax refund was also without merit.

POINT II

THE OPINIONS BELOW PROPERLY HELD THAT PETITIONER'S MALPRACTICE CLAIM WAS TIME-BARRED UNDER THE NEW YORK STATUTE OF LIMITATIONS

The record below indicated that the instant action was commenced on November 28, 1979 over three years after the date of Judge Bonsal's opinion and order of July 30, 1976 which had dismissed the earlier tax case. The record also indisputably indicated that all of the legal services were performed in the State of New York, and were completed on or before Judge Bonsal's opinion and order was rendered.

In that the legal services were performed in the State of New York, the applicable statute of limitations governing petitioner's case, if any, was the statute of limitations of the State of New York.

Leonhard v. United States, slip op. 5213, 5229 (2d Cir. Aug. 28, 1980); Quinn v. Syracuse Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980). See, also, Guarantee Trust Co. v. York, 326 U.S. 99, 109 (1945).

To the extent petitioner's complaint alleged a claim in common law malpractice, it was time-barred by New York's three-year statute of limitations under Civil Practice Law and Rules (CPLR) § 214(6). The District Court and Second Circuit opinions which held that it was clear that the action was time-barred were proper and should not be disturbed.

Petitioner argued for the first time in the Second Circuit that the applicable statute of limitations should be the New York six-year period for actions based on fraud. The Second Circuit properly held that petitioner did not plead fraud either in her complaint or in any of her moving papers in the District Court, and that

allegations of fraud must be stated with particularity when filed in the District Court in order to state a cause of action, F.R.Civ.P. Rule 9(b). Finally, it is respectfully submitted that there was no merit to petitioner's contentions on any basis even if her claims were not time-barred.

CONCLUSION

The petitioner has made no credible claim of federal jurisdiction, and in any event her claims were time-barred under the applicable New York statute of limitations. The Petition for a writ of certiorari should be denied.

Dated: New York, New York
February 17, 1981

Respectfully submitted,

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